

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JOSEPH MASTERSON)	
Claimant)	
)	
VS.)	
)	
MT. CARMEL MEDICAL CENTER)	
Respondent)	Docket No. 1,009,942
)	
AND)	
)	
LIBERTY MUTUAL INSURANCE)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier requested review of the preliminary hearing Order entered by Administrative Law Judge Jon L. Frobish on August 21, 2003.

ISSUES

This is a claim for a June 4, 2002 accident. Judge Frobish awarded claimant temporary total disability benefits from April 9, 2003 through July 3, 2003. Respondent and its insurance carrier do not dispute the compensability of this claim. In fact, they agreed to pay claimant temporary total disability compensation after July 3, 2003 through August 5, 2003. However, respondent and its insurance carrier contend Judge Frobish lacked the authority and jurisdiction to order temporary total disability compensation. They argue claimant did not comply with K.S.A. 44-534a because claimant did not provide written notice of the specific benefit change being sought. They also contend that the Judge erred because the off work slip was not from an authorized doctor, it did not specify that it was for the work-related back injury and it did not take into account claimant's actual job duties, with or without accommodation. ¹ Accordingly, respondent and its insurance carrier request the Board to reverse the ALJ's Order and deny the temporary total disability benefits for the period of April 9, 2003 to July 3, 2003.

¹ See K.S.A. 44-501; K.S.A. 44-510c.

Conversely, claimant argues this appeal should be dismissed because respondent and its insurance carrier do not raise issues that are subject to review from a preliminary hearing order. In the alternative, claimant requests the Board to affirm the Order.

The issues before the Board on this review are:

1. Does the Board have jurisdiction to review the preliminary hearing Order?
2. If so, is claimant entitled to receive the temporary total disability benefits ordered?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date, the Board finds and concludes:

The issues raised by respondent and its insurance carrier in this appeal are not subject to review from a preliminary hearing order. Accordingly, this appeal should be dismissed.

This is an appeal from a preliminary hearing order. Consequently, the Board's jurisdiction to review preliminary hearing findings is limited. At this stage of the claim, not every alleged error is subject to review. Generally, the Board can review preliminary hearing orders in which an administrative law judge has exceeded his or her jurisdiction.² Moreover, the Board has specific authority to review the preliminary hearing issues listed in K.S.A. 44-534a, which are:

- (1) whether the worker sustained an accidental injury,
- (2) whether the injury arose out of and in the course of employment,
- (3) whether the worker provided the employer with timely notice and with timely written claim, and
- (4) whether certain other defenses apply.

The term "certain defenses" refers to defenses that dispute the compensability of the injury under the Workers Compensation Act.³

The issue of whether a worker satisfies the definition of being temporarily and totally disabled is not one of the jurisdictional issues listed in K.S.A. 44-534a that are subject to

² K.S.A. 2001 Supp. 44-551(b)(2)(A).

³ *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 994 P.2d 641 (1999).

review from a preliminary hearing order. Rather, this issue concerns questions of law and fact over which an administrative law Judge has the jurisdiction to determine at a preliminary hearing.

Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.⁴

Respondent and its insurance carrier's argument that the Judge exceeded his jurisdiction by awarding temporary total disability benefits without proper medical evidence is without merit. Temporary total disability benefits can be awarded on claimant's testimony alone.⁵ Accordingly, expert medical testimony is not required.⁶ In this instance, claimant testified as to his present condition, what treatment he had undergone, and his attempts to return to work. The record also contains medical exhibits regarding claimant's treatment and his medical condition, including Dr. William Sullivan's April 9, 2003 prescription slip that states "patient to remain off work until medically cleared"⁷ and an "off-work slip" from Dr. James Cole dated July 3, 2003.⁸

Respondent alleges that claimant failed to specify the benefits being sought and to include copies of the medical records to be offered as exhibits at the preliminary hearing with his Application for Hearing. Claimant's July 8, 2003 notice of intent letter contained a "demand for payment of temporary total disability benefits" but did not specify for what period of time. As for the exhibits, claimant contends he furnished respondent with all the exhibits. Respondent's remedy is an evidentiary one. That is, the failure to follow the statutorily prescribed procedure may be a basis for excluding evidence. Also, a lack of specificity in claimant's pleadings could result in the ALJ denying the requested benefits. Although these remedies were available respondent admits that it did not raise either as an issue to the ALJ at the preliminary hearing. Respondent did not object either to the sufficiency of the claimant's notice of intent letter, nor to the exhibits claimant offered at the hearing.⁹ The Board finds that claimant substantially complied with the procedural

⁴ *Allen v. Craig*, 1 Kan. App. 2d 301, 303-304, 564 P.2d 552, *rev. denied* 221 Kan. 757 (1977).

⁵ *See Overstreet v. Mid-West Conveyor Co., Inc.*, 26 Kan. App. 2d 586, 587, 994 P.2d 639 (1999).

⁶ *See Armstrong v. City of Wichita*, 21 Kan. App. 2d 750, 907 P.2d 923 (1996).

⁷ P.H. Trans., Cl. Ex. 1.

⁸ P.H. Trans., Cl. Ex. 2.

⁹ Respondent objected to claimant's exhibit 1 on other grounds, which were overruled.

requirements for a preliminary hearing and the ALJ did not exceed his jurisdiction by ordering the requested temporary total disability compensation.¹⁰

As provided by the Act, preliminary hearing findings are not final but subject to modification upon a full hearing of the claim.¹¹

WHEREFORE, the Board dismisses respondent and its insurance carrier's appeal.

IT IS SO ORDERED.

Dated this _____ November 2003.

BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
John I. O'Connor, Attorney for Respondent and Liberty Mutual Insurance Company
Jon L. Frobish, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

¹⁰ See *Hayes v. Ratheon Aircraft Company*, Docket Nos. 230,784 & 230,785 1998 WL 304301 (Kan. WCAB May 7, 1998); *Eldridge v. Champ Service Line Division*, Docket No. 189,361 1997 WL 557535 (Kan. WCAB Aug. 21, 1997).

¹¹ K.S.A. 44-534a.